IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO.1140 OF 1996

1. Erick Ansulem Mendes
2. Haven Ansulem Mendes
3.Dr.Babubhai Ishwarbhai Patel ...Appellants

Vs.

1. Dr.Surendra N. Bhasale
2. Dr.Suprita Bhasale ...Respondents

Mr.Jitendra G.Damani for the Appellants
Mr.A.A.Kumbhakoni with Mr.T.D.Deshmukh i/b Mr.Ashok V. Jain
for the Respondents.

CORAM: A.S.OKA, J.
DATED: MARCH 28,2005.

P.C.:

1. An exception is taken to the Judgment and Order dated 11th September 1996 passed by the learned Judge of the City Civil Court in Notice of Motion taken out by the Appellants who are the original Plaintiffs. The Respondents are the original Defendants.

2. By Judgment and Order dated 13th August 1996 the suit filed by the Appellants was dismissed. In the Notice of Motion taken out by the Appellants, a prayer was made for setting aside the dismissal of the suit and for restoration of the suit. By the impugned Judgment and Order, the learned Trial Judge held that Notice of Motion taken out under Order IX Rule 9 of Code of Civil Procedure, 1908 was not maintainable. The learned Trial Judge held that the Court

proceeded under Order XVII Rule 2 of the said Code and the suit was dismissed on merits.

3. The learned Counsel appearing for the Appellants has invited my attention to the Roznama of the proceedings and submitted that the suit was dismissed by invoking the provisions of Rule 8 of Order IX of the said Code. He submitted that when the Appellants-Plaintiffs did not appear on the date fixed for hearing, the suit was dismissed by the Trial Court and therefore the said order will have to be construed as an order under Order IX Rule 8 of the said Code and therefore the Notice of Motion ought to have been entertained and the suit ought to have been restored.

4. The learned Counsel appearing for the Respondents submitted that when the suit was fixed for hearing and when one of the parties was absent, the trial Court had option either to dispose of the suit in one of the modes prescribed by Order IX or make such other order as it thinks fit. He submitted that the learned trial Judge did not exercise the option of adopting one of the modes under Order IX. He placed reliance on the decision of this Court reported in A.I.R. 1941 Bombay page No.83 (Rukmansa Rajansa Hosmani Vs. Shankargouda Basangouda Lakhyal). He therefore submitted that the learned Trial Judge was right when he held that the Notice of Motion was not maintainable.

5. With a view to appreciate the submissions made by the Counsel for the parties, it will be necessary to refer to the Roznama of the proceedings of the suit. The Roznama dated 4th July 1996 shows that none was present on behalf of the Appellants-Plaintiffs. Later on the Advocate for the Appellants appeared. Issues were framed on the same day and the suit was adjourned to 12th August 1996 for recording of evidence. On 12th August 1996 when the suit was called out, suit was kept back. After it was called out after recess the Roznama notes that,

> . "Inspite of it being pointed out to the Plaintiffs advocate, that he should make arrangement for representation of plaintiff by 2.45 p.m. none for the plaintiff is available for the plaintiff till 3.40 p.m. It is therefore deemed that the plaintiff has no evidence to lead and hence recording of evidence of defendant is commenced."

After making such observations in the Roznama, the Court proceeded to record the evidence of witness No.1 for the Respondent Nos.1-Defendant.

6. Perusal of the Judgment and Order dated 13th August 1996 shows that on 4th July 1996 the Advocate for the Appellants had assured the Court to take steps to implead one Mayurika as Plaintiff No.4. On 12th August 2004 when it was found that no steps to implead the party was taken for a period of five weeks, the learned Trial Judge declined to grant the adjournment. The learned Trial Judge directed the Plaintiffs to remain present at 2.45. As the Plaintiffs were not

present after 2.45 p.m.,the learned Trial Judge proceeded to record the evidence of Witness No.1 of the Respondents-Defendants. While dismissing the suit the learned Trial Judge has dealt with the merits of the case and has answered all the issues on merits.

7. It will be necessary to refer to the Rule 2 of Order XVII of the said Code which read thus :

> 2. Procedure if parties fail to appear on day fixed -
>
> . Where, on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may proceed to dispose of the suit in one of the modes directed in that behalf by Order IX or make such other order as it thinks fit.

Rule 3 of Order XVII is also material which read thus :

> 3. Court may proceed notwithstanding either party fails to produce evidence etc.-
>
> . Where any party to a suit to whom time has been granted fails to produce his evidence, or to cause the attendance of his witnesses, or to perform any other act necessary to the further progress of the suit, for which time has been allowed,[the Court may, notwithstanding such default, -
>
> (a) if the parties are present, proceed to decide the suit forthwith; or
>
> (b) if the parties are, or any of them is, absent, proceed under rule 2]

If the court was to exercise option of adopting one of the modes under Order IX, the Court would have dismissed the suit, once it was found that the Plaintiffs were not

present. However, instead of dismissing the suit under Rule 8 of Order IX, the court directed the Respondents to lead evidence and accordingly evidence was led by the Respondents by examining the witnesses and providing documents. Thus, it is obvious that the Trial Court adopted second option under Rule 2 of Order XVII and passed the order directing the Respondents to lead evidence.

8. At this state reference will have to be made to the decision of Division Bench of this Court in case of Rukmansa (supra) which read thus :

. "This is an appeal against a decree passed by the first class subordinate Judge of Bijapur. the plaintiff sued for a sum of approximately Rs.11,000/-. The defendants admitted that a sum of Rs.5976/- and certain interest was due. At the first hearing the Court framed issues under O. 15, R.3, sub-r (1), Civil P.C. and then adjourned the further hearing, under sub-r (2), to 15th February 1939. On that date the plaintiff alleged through his pleader that he was ill, and asked for an adjournment. The adjournment was refused, and the pleader thereupon withdrew, saying that he had no instructions to proceed. The learned Judge then dealt with the case on merits and answered the issues. He came to the conclusion that the defendants proved that only the amount admitted by them was due; in effect therefore he rejected the balance of the plaintiff's claim, and passed a decree against the defendants for the amount admitted to be due, and directed payment by certain instalments. The plaintiff contends on this appeal that the order ought to have been made under O.9, R.8, decreeing the amount of the claim admitted by the defendants, but dismissing the balance of the claim for want of appearance. an order in that form would entitle the plaintiff to apply to get the dismissal set aside under O.9, R.9. Mr.Jathar for the respondents contends that in effect the order is

> one decreeing part of the claim and dismissing the rest for want of appearance; and that there is no substance in the appeal; but I do not think that that contention can be supported. **In my opinion, the case was dealt with on merits, and the balance of the plaintiff's claim was dismissed on merits. If that is so, plaintiff can only appeal on merits, and he has no evidence..."**

9. An application for setting aside the dismissal of the suit under Order IX Rule 9 can be made when the suit is wholly or partly dismissed under Order IX. As stated earlier, the Trial Court did not adopt any of the modes under Order IX for dismissal of the suit. In this view of the matter, the learned Trial Judge was right when it was held that the order of dismissal was not passed under Rule 8 Order IX of the said Code and therefore Notice of Motion taken out by invoking Rule 9 Order IX was not maintainable.

10. Hence, there is no merit in the Appeal and the same is dismissed with no order as to costs.

11. It is made clear that notwithstanding the dismissal of this Appeal the Appellants will be free to adopt appropriate proceedings for challenging the impugned Judgment and Decree passed in the suit.

12. Ad-interim relief granted on 7th October 1996 is extended for a period of six weeks from today.

Judge.